

CENTRAL ELECTRICITY BOARD v. COMMISSIONER OF THE FEDERAL CAPITAL & ANOR.; INSURANCE COMPANY OF NORTH AMERICA — 3rd Party

[O.C.J. (Gill J.) June 2, 1967]

[K.L. — Civil Suit No. 230 of 1965]

Limitation — Lapse of time — Inherent power of court to extend time — Party choosing wrong forum.

Arbitration — Insurance policy providing for arbitration — Policy providing that claim to be treated abandoned if matter not referred to arbitration within 12 months — Party proceeding to court instead of resorting to arbitration — Lapse of time for arbitration — Whether court can extend time — Inherent jurisdiction of court — Arbitration Ordinance, 1950, ss. 5 and 21.

The 1st defendant sought to vary an order made in this action whereby all further proceedings against the 3rd party were stayed pursuant to section 5 of the Arbitration Ordinance, by adding a term therein that the 3rd party should not be entitled to rely on the lapse of time between August 4, 1965 and September 26, 1966, as a defence to any arbitration proceedings between them.

The 3rd party was joined in the action by a 3rd party notice claiming that under a policy of insurance issued by the 3rd party on March 9, 1962 and subsequently renewed the 1st defendant was entitled to be indemnified by the 3rd party in respect of the plaintiff's claim herein against him for damages. The 3rd party applied for a stay of proceedings under section 5 of the Arbitration Ordinance, by way of a notice of motion taken out on August 4, 1965 and finally heard on September 8, 1966 on which date the order sought to be varied was made. The order for stay was made on the ground that condition 7 of the policy of insurance provided (i) all differences arising out of the policy should be referred to arbitration, (ii) if the company should disclaim liability to the insured for any claim and such claim was not referred to arbitration within 12 calendar months from the date of such disclaimer, then the claim should for all purposes be deemed to have been abandoned and should not thereafter be recoverable.

Held: (1) the court had no inherent jurisdiction to extend time except where such power was expressly given to it under a provision of the law;

(2) in this case the 1st defendant had notice of the 3rd party's application for stay of proceedings, and thus had notice of the fact that he had chosen the wrong forum. It was for him then to have considered condition 7 of the insurance policy and taken steps to drop his proceedings against the 3rd party and to refer the matter to arbitration. In failing to do so, he had allowed time to run out, for which he had nobody but himself to blame;

(3) the words "or otherwise as the court thinks just" in section 21 of the Arbitration Ordinance did not give the court the power to make any order to the detriment of the 3rd party who had been wrongly joined as a party. Those words meant that the court might in a proper case decline to make an order as to costs in favour of the 3rd party seeking a stay.

Cases referred to:—

- (1) *MacKenzie v. Marquis of Powis* (1737), 3 E.R. 183.
- (2) *Sturt v. Mellish* (1743), 26 E.R. 765.
- (3) *Sirdefield v. Price* (1827), 148 E.R. 837.
- (4) *Liberian Shipping Corporation v. A. King & Sons Ltd.* [1967] 1 All E.R. 934.

A CIVIL SUIT.

L. P. Thean for the applicant.

D. G. Ironside for the 3rd party.

Cur. Adv. Vult.

Gill J.: This is an application by the first defendant for a variation of the order made herein on 26th September, 1966, whereby all further proceedings in this action against the third party were stayed pursuant to section 5 of the Arbitration Ordinance, 1950, by adding a term therein that the third party shall not be entitled to rely on the lapse of time between 4th August, 1965 and 26th September, 1966 as a defence to any arbitration proceedings between them.

The third party was joined in the action by a third party notice issued on 8th June, 1965 and served on 2nd July, 1965. The notice claimed that under a policy of insurance No. 41MA1251 issued by the third party on 9th March, 1962 and subsequently renewed the first defendant was entitled to be indemnified by the third party in respect of the plaintiff's claim herein against him for damages.

The application by the third party for a stay of proceedings under section 5 of the Arbitration Ordinance, 1950 was made by way of a notice of motion taken out on 4th August, 1965. It came on for hearing on 6th September, 1965 but was adjourned to a date to be fixed. It was finally heard on 8th September, 1966, on which date the order sought to be varied was made.

The order for stay of execution was made on the ground that condition 7 of the policy of insurance provided that all differences arising out of the policy shall be referred to arbitration. Condition 7 further provided that if the company shall disclaim liability to the insured for any claim and such claim was not referred to arbitration within 12 calendar months from the date of such disclaimer, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable.

Section 21 of the Arbitration Ordinance, 1950 provides that an order for a stay made pursuant to section 5 thereof may be made on such terms as to costs or otherwise as the court thinks just. It is contended on behalf of the first defendant that the court thus has an express power to impose conditions when ordering a stay, and that one of the conditions which the court can impose is that the third party shall not be entitled to rely on the lapse of time as a defence in the arbitration proceedings. It is also submitted that the court has a similar power under its inherent jurisdiction. It is agreed that there is no direct authority precisely on the point, but it is contended that there are abundant authorities which are applicable by analogy.

The authorities relied upon are the decisions of the Court of Chancery in the days when the Court of Chancery was separate from the Court

of Common Law. It is said that prior to the amalgamation of the two courts, where a claimant filed his claim or "exhibited a bill" in the Court of Chancery but the Court of Chancery later found and decided that the appropriate forum was not that court but the Court of Common Law, the former might retain the bill and direct a trial in the Court of Common Law. In such an event, if the relevant period of limitation had expired, the Court of Chancery very often in directing a trial at law also directed that the defendant should not be permitted or entitled to set up in the Court of Common Law the Statute of Limitations or any similar defence in barring the plaintiff's claim, the time having run out during the pendency of the bill in Chancery. One of the authorities cited for this proposition is the case of *MacKenzie v. Marquis of Powis*.⁽¹⁾

It is further argued that there were other instances or cases where the Court of Chancery, even though it dismissed, and did not retain the bill, leaving the litigant at liberty to sue in a Court of Common Law, in so dismissing the bill directed that the time which had run during the pendency of the suit in Chancery should not be taken advantage of at law (see *Sturt v. Mellish* ⁽²⁾). In *Sirdefied v. Price* ⁽³⁾ the defendant was prevented from taking advantage of the lapse of time during the pendency of the suit in equity even though no such direction had been given by the Court of Equity when ordering the matter to be tried at law.

It is contended for the first defendant that the principle evolved out of those cases is applicable to the present case in that the court, not being the proper forum because of the arbitration clause in the policy of insurance, in ordering a stay of proceedings so that the matter might be referred to arbitration, had the power to direct that the period between the date of the application and the date of the order for stay of proceedings shall not count for the purpose of computing the time within which the matter had to be referred to arbitration under the relevant clause of the contract of insurance, and that the court has the power to make such an order at this stage.

I do not agree that it is possible to argue a matter on the analogy of the normal practice in England before the amalgamation of the Court of Chancery with the Court of Common Law. What the first defendant is asking the court to do is to grant him an extension of time within which he is required by the contract of insurance to refer the matter to arbitration, when there is no express provision in the contract or the Arbitration Ordinance under which an order for such extension of time can be made. Our Ordinance is based on the English Arbitration Act, 1889 which also contained no such provision. The courts in England were first given jurisdiction to extend the time under the Arbitration Act,

A 1934 and a similar jurisdiction is now contained in section 27 of the Arbitration Act, 1950. In *Liberian Shipping Corporation v. A. King & Sons Ltd.*⁽⁴⁾ Lord Denning M.R. said:—

"These time limit clauses used to operate most unjustly. Claimants used to find their claims barred when, by some oversight, they were only a day or two late. In order to avoid that injustice, the legislature intervened so as to enable the courts to extend the time whenever 'in the circumstances of the case undue hardship would otherwise be caused'."

Salmon L.J. in the same case in referring to section 27 of the Arbitration Act, 1950 said:—

"Prior to this enactment, which was first introduced into the law in 1934, the commercial community — and not only the commercial community, but also those who practised and administered commercial law — were shackled by the form, sometimes the printed form, of this type of arbitration clause. It put it out of the power of the court to grant any relief to a claimant who had allowed perhaps a day or two to run beyond the period (sometimes only ten days) specified in the clause, even although the delay could have caused no conceivable harm to the other side. Commercial men and those who practised and administered the commercial law had spent their working lives with the law in this state. They had no doubt experienced many cases in which a man with a perfectly good claim for thousands of pounds worth of damage for breach of contract inadvertently allowed a day or two to go by and was thereby deprived of the right to be compensated for the loss which he had suffered. The other party, who had not been in any way affected by this slight delay and who perhaps had been guilty of a deliberate breach of contract, was relieved from liability to pay compensation for the heavy loss which he had caused."

It was no doubt to remedy this hardship and injustice that the legislature intervened to alter the law. This enactment was a beneficent reform, liberalising the law in an admittedly narrow sector of the commercial field."

Unfortunately, the legislature in this country has not intervened to alter the law. The court therefore, in my opinion, has no power to extend the time in such cases. It is said that time should not run against the first defendant by reason of the third party's delay in having its motion for stay brought up for hearing. I do not think that the first defendant can be heard to complain about this delay. He had notice of the application by the third party for stay of proceedings, and thus had notice of the fact that he had chosen the wrong forum. It was for him then to have considered condition 7 of the policy of insurance and taken steps to drop his proceedings against the third party and to refer the matter to arbitration. In failing to do so, he has allowed time to run out, for which he has nobody but himself to blame. In my opinion, the words "or otherwise as the court thinks just" do not give the court the power to make any order to the detriment of the third party who has been wrongly joined as a party. Those words in section 21, to my mind, mean that the court may in a proper case decline to make an order as to costs in favour of the third party seeking a stay. The court has no inherent juris-

diction to extend time except where such power is expressly given to it under a provision of the law.

The application is dismissed with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok; D. G. Ironside.*

LEE FAH SANG v. PUBLIC PROSECUTOR

[F.C. (Azmi C.J. (Malaya), Ong Hock Thye F.J. & Gill J.) June 5, 1967]

[K.L. — Federal Court Criminal Appeal No. X. 1 of 1967]

Penal Code ss. 34 & 387 — Conviction under s. 302 read with section 34 altered to one under s. 387 — Evidence of previous demand not pointed out in direction to jury.

Where there was evidence that the accused and his colleagues had previously demanded money from the deceased and his father and there was therefore a probability that, the accused and his colleagues who went to see the deceased it was for the purpose of extorting, the trial judge should have pointed this fact to the jury and the jury had to be satisfied beyond reasonable doubt that common intention to kill was present long before that time, or in this case could have arisen just before the gun shot fire. There was also the probability that the deceased was killed because he strenuously refused to accede to the payment to the extortioners at that moment with the result that further arguments ensued and that therefore, the killing was not the original intention of the persons. In the circumstances, the necessary common intention could not have existed. If thus directed the jury might have not come to the same verdict.

Case referred to:—

(1) *Mahbub Shah v. Emperor* (1945), L.R. 72 I.A. 148; A.I.R. 1945 P.C. 118; [1945] M.W.N. 373.

FEDERAL COURT.

K. L. Devaser for the appellant.

Abu Talib bin Othman (Deputy Public Prosecutor) for the respondent.

Azmi C.J. (Malaya): On 11th April 1967, when we heard this appeal we altered the conviction to one under section 387 of the Penal Code and sentenced the appellant to 7 years' imprisonment with affect from that day and also to suffer 10 strokes of the rotan and we indicated we would give our reasons later. I will now read our grounds of judgment.

The appellant was convicted at Malacca on the following charge:—

"That you on the 1st day of September, 1964 at or about 5.00 p.m. at the 10th milestone Tebong Estate, in the District of Alor Gajah, in the State of Malacca, with two others and in furtherance of the common intention of you all, did commit murder by causing the death of one Lock Kwang Weng and thereby committed an offence under section 302 read with section 34 of the Penal Code."

The evidence would appear to show that on the day in question the deceased's wife, P.W.7, his son P.W.8, his father P.W.9 and his sister-in-law P.W.10, at about 5 p.m. heard a sound of a gun-shot coming from the direction of the

A family's vegetable garden not far from the house. P.W.8 went to investigate and before he could get to where the deceased was working he heard the deceased telling him to go away, at the same time telling him that he, the deceased, had been shot by Wong Kee. P.W.8 turned round and went to the house and about that time he saw three men coming from the direction of the vegetable garden. They were Wong Kee with a gun, the appellant with a parang and another known as Ah Kong Chai. P.W.7, P.W.9 and P.W.10 who were then in the house saw the three persons. P.W.10 fired a shot from a gun in the house. The three persons then turned away and ran towards the jungle.

There was evidence to the fact that previous to this incident, the appellant and other persons had tried to extort money from the deceased and his father P.W.9.

D The prosecution also relied on certain dying declarations made by the deceased to the effect that he was shot by Wong Kee and slashed by the appellant and that the third man was also present there.

One of the grounds of appeal reads as follows:—

E "The learned trial judge failed to give the jury sufficient and/or proper direction on the issue of common intention that they must be satisfied on the evidence that there existed between the appellant and 2 others a common intention to kill the deceased."

The learned judge in his summing-up read to the jury the provision of section 34 of the Penal Code which reads as follows:—

F "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

He then went on to illustrate the above as follows:—

G "As an illustration let us say that A, B and C acting together went out with the intention of murdering Z, and one of them carried a gun. When they met Z, A caught hold of him, B stood by preventing anyone giving assistance to Z, and C shot Z dead with the gun. All of them would be guilty of the murder of Z even though two of them did not fire the shot. On the other hand if A, B and C acting together went out with the intention of robbing Z. When they met Z, A caught hold of him and Z puts up a fight. Then B took out a concealed dagger from his pocket and stabbed Z to death. In this case, only B is guilty of murder as their common intention was to commit robbery."

H Then the learned judge explained the meaning of the word "intention" and that the existence of an intention could be inferred from surrounding circumstances such as the type of weapon used, the nature of injuries inflicted, and the parts of the body where the injuries were inflicted. He then went on to say "in like manner common intention can also be proved."

I Lord Thanterton in *Mahbub Shah v. Emperor* ⁽¹⁾ said:—